IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1240 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VRAJLAL NATHJIBHAI SARAIYA & MATHURIBEN VRAJLAL NATHAJI
Versus
PUSHPABEN D/O. VRAJLAL NATHJIBHAI & WIFE OF INDRAVADA

Appearance:
MR RN SHAH for Petitioner
MR SN SHELAT for Respondent No. 1
MR SURESH C SHAH for Respondent No. 4

CORAM : MR.JUSTICE D.P.BUCH
Date of decision: 06/02/2001

ORAL JUDGEMENT

1. This is an appeal by the appellant above named being original defendant in Special Civil Suit No. 40/87 decided on 13th August, 1984 by the learned Civil Judge (SD), Godhara, who directed the present appellant and

other defendants, who are respondents Nos. 1 to 3 before this Court to hand over the peaceful possession of the suit property to respondent no. 4 original plaintiff on or before 15th September, 1984. The trial Court also directed the present appellant and respondent nos. 1 to 3 to pay the costs of the respondent no. 4 and to bear their own costs in the suit. The trial Court further directed the respondent no. 4 to deposit the amount of Rs. 6000/- in the court on or before 15th September, 1984 and it was further directed that the appellant and respondent nos. 1 to 3 would be at liberty to withdraw the said amount after handing over the possession of the suit property to respondent no. 4 original plaintiff.

2. The facts of the case may be, briefly stated are as under :

(1) Respondent no. 4 had instituted the aforesaid suit before the learned Civil Judge against the appellant as well as respondent nos. 1 to 3 for possession of a property situated in the Harsol Vada, bearing City Survey No. 621, admeasuring 160 yards. Respondent no. 4 claimed to be the owner of the said property.

(2) It appears from the pleadings, the respondent no. 4 has taken up a contention in the suit before the Trial Court that on 31st May, 1971, deceased Vrajlal had sold the aforesaid property of City Survey No. 621 in the sum of Rs. 27,000/- to respondent no. 4 and defendant no. 1, who is appellant before this Court in this appeal had attested the sale deed. Since the date of execution of the sale deed, the present respondent no. 4 was in possession of the suit property. That the respondent no. 4 had also become the owner thereof by virtue of the said sale deed. That mutation entry was also entered in the City Survey record and Municipal record in the name of respondent no. 4.

(3) Thereafter, deceased Vrajlal had given a sum of Rs. 6000/- to respondent no. 4 on 7.6.1997, and respondent no. 4 had executed an unregistered possessory mortgage in favour of deceased Vrajlal and in turn it was agreed that the respondent no. 4 would not charge rent for the property being possessed by the deceased Vrajlal. So on one hand, respondent no. 4 had not to charge rent and on the other hand, deceased Vrajlal had not to charge interest on the said amount. It was further agreed that the aforesaid amount was required to be refunded to respondent no. 4 within five years from the date of execution and deceased Vrajlal had to hand over the possession of the said property at that point of time.

(4) The respondent no. 4 contended that on completion of the said period of five years, she issued notices to the appellant as well as respondent Nos. 1 to 3 stating that they could receive the amount of Rs. 6000/- and possession of the said property be handed over to the respondent no. 4. That since the said amount was not taken by the appellant as well as respondent nos 1 to 3, the respondent no. 4 instituted the aforesaid suit for possession of the said property.

(5) The suit was registered and summons was issued to the appellant as well as respondent nos. 1 to 3. The suit was resisted by the said defendants and in written statement, it was contended that the said Court had no jurisdiction to entertain the suit. That the said defendants were the tenants in respect of the suit property. That the suit was not maintainable and that it was barred by law of limitation. It was their contention that the document of possessory mortgage was a shame document and it was a contract of lease and therefore, the said defendants were tenants of the said property and therefore, the Civil Court cannot entertain the suit against the said defendants.

(6) Looking to the pleadings of the parties, the learned trial Judge had framed necessary issues at Ex. 21. After affording an opportunity to lead evidence and to argue the matter, the learned trial Judge recorded his findings to the effect that the defendants had failed to prove that they were in possession of the suit premises as tenants at a monthly rent of Rs. 60/-. The trial Court also found that the suit was maintainable in the present form. That the Court had jurisdiction to entertain the suit. That the suit was not time barred and that the respondent no. 4 was entitled to get the reliefs as claimed.

(7) Accordingly, the trial Court has granted the decree in favour of respondent no. 4 and against the appellant as well as respondents nos. 1 to 3 directing them to hand over the vacant possession of the suit property to respondent no. 4. The trial Court further directed respondent no. 4 to deposit an amount of Rs. 6000/- in the Court and further directed that the appellant as well as respondent nos. 1 to 3 would be at liberty to withdraw the same after handing over the possession of the suit property to respondent no. 4.

(8) Being aggrieved by the said judgement and decree of the trial Court, the appellant has preferred this

appeal before this Court. Similar contentions have been taken in the appeal again and it has been contended that the learned trial Judge has not appreciated the law and facts involved in the case. That the Trial Court had no jurisdiction to entertain the suit. That the trial Court has failed to appreciate the position that the appellant as well as respondent nos. 1 to 4 are the tenants. That the suit was wrongly found to be within limitation and therefore, it has been contended that the judgement and decree of the trial Court are illegal and erroneous and deserve to be set aside.

(9) It is therefore, prayed that the present appeal be allowed and judgement and decree of the trial Court be set aside and the suit of the respondent no. 4 be ordered to be dismissed with costs.

(10) On receiving the First Appeal, notices were issued to the respondents. Mr. S.C. Shah, learned advocate appears for the contesting respondent no. 4. I have heard the learned advocates for the parties and have perused the papers.

(11) Mr. R.N.Shah, learned advocate appearing for the appellant has argued at length and had taken me through the judgement of the trial Court and through the oral and documentary evidence produced before the trail Court by the parties.

(12) It has been mainly contended by Mr. R.N. Shah, learned advocate for the appellant that the trial Court has erred in holding that it had jurisdiction to entertain the suit. Now, it is true that the present appellant as well as respondent nos. 1 to 3 had taken up a defence before the trial court that they were the tenants of the property in question, but this does not mean that the court could not entertain the suit or that it had no jurisdiction to entertain the suit. The jurisdiction of the Court would depend upon the allegations made in the plaint. The plaint, nowhere shows that the appellant as well as respondent nos. 1 to 3 were tenants. Therefore, from that angle, it could not be said that the trial Court has no jurisdiction to entertain the suit.

(13) It is further argued by Mr. R.N.Shah, for the appellant that the suit ought to be valued at Rs. 6000/- and therefore, the suit ought to be filed before the learned Civil Judge (JD) and therefore, the court, which entertained the suit, had no jurisdiction to entertain the suit.

(14) At the same time, again it has to be considered that the suit has been valued for the purpose of court fees and jurisdiction at Rs. 25,000/-. This can be gathered from the heading of the plaint itself, where, it has been stated that the respondent no. 4 had brought the suit valuing the same at Rs. 25,000/-. Then, again in para 9, it has been stated by respondent no. 4 that the respondent no. 4 claimed possession in respect of the ground floor of the property in question and the market value of that part of the said property is Rs. 25,000/- and therefore, the suit is valued at Rs. 25,000/- accordingly.

(15) Now, it is clear that the suit was filed in year 1981 and at that time the suit having valuation exceeding Rs. 25,000/- was entertainable by court of the Senior Division and not by the court of the Civil Judge (Junior Division) and therefore, having regard to the valuation put up by the respondent no. 4, it cannot be said that the Civil Court (SD) had no jurisdiction to entertain the suit.

(16) At the same time, it has been also considered that if the suit had been valued at Rs. 6000/- for the purpose of court fees and jurisdiction, the appeal would lie before the District Court and not before this Court in view of the provisions made in Section 26 of the Bombay Civil Court Act, 1869.

(17) It is then contended that it has not been made clear as to how the suit has been filed by respondent no. 4 against the appellant as well as respondent Nos. 1 to 3 for the possession in respect of the property in question. It is therefore, submitted by Mr. R.N. Shah, learned advocate for the appellant that there is some sort of contention on the part of respondent no. 4 in claiming her right of possession in the suit. That on one hand, she has contended that there is a written document with respect to the possessory mortgage in respect of the property in question, and on the other hand, she also says that the document for possessory mortgage is an unregistered one, parties to the document did not get any right from the said document and therefore, respondent no. 4 can fall back on her title to claim a decree for possession against the appellant as well as respondent Nos. 1 to 3. Mr. R.N.Shah submits that this dual contention cannot be entertained by the Civil Court and the respondent no. 4 cannot be permitted to raise these dual contentions, which are self contradictory.

(18) On the other hand, Mr. S.M.Shah, learned advocate appearing for the respondent no. 4 has made it clear that this is not a contradictory stand taken by the respondent no. 4. It is his contention that this document stands for possessory mortgage in respect of the property in question between the parties. It is also his defence that this document is not a registered one and therefore, it would not give rise to any right to the property either to the respondent no. 4 or to the appellant as well as respondent nos. 1 to 3. It is his argument that the value of the property exceeds the amount of Rs. 100/- and therefore, no mortgage could be legally effected in respect of the such an immovable property unless there is a registered document on due stamp paper and since is is not a registered one, it does not create any interest in the property. In short, he claims that it is not a document in the eye of law at all.

(19) It is an admitted position that the value of the property in question exceeds the amount of Rs. 100/-. It is more so when the document itself shows that it is a possessory mortgage for an amount of Rs. 6000/- and therefore, it is bound to be registered and it is bound to have been executed on appropriate stamp paper. It is neither executed on appropriate stamp paper nor it has been registered in accordance with the provisions made in Bombay Stamp Act and Bombay Registration Act. In absence of such a registered document, it cannot give rise to any right to the parties to the document. Even interest cannot be said to be created in favour of either party to the said document. Therefore, the said document would not be enforceable amongst the parties to the same. There cannot be any dispute about the said legal position.

(20) In that view of the matter, the learned advocate for the respondent no. 4 has relied upon a decision of the Hon'ble Supreme Court in case of KOLATHOOR VARIATH AND ANOTHERS VS. PAIRAORAJITOTH CHERIYA KUMHAHAMMMAD HAJI, reported in 1974 SC 689, wherein, it has been observed by the Hon'ble the Apex Court that where a plaintiff cannot regain possession on the basis of an oral mortgage as it cannot be proved in a court of law for want of registration, it is open to him to recover possession on the strength of his title. Therefore, it is clear that when the mortgage cannot be be proved for want of registration, the plaintiff can fall back on his/ her title to claim possession of the property on the basis of her title.

(21) Almost, similar view was taken by this Court in case of VORA AMINABAI IBRAHIM VS. HEIRS OF DECEASED SUGRABAI YUSUFALI MAKATI VORA MOHMEDALI ZAFARBHAI AND OTHERS, reported in 1983 G.L.H. (UJ.41), page 36, wherein, it has considered the aspect of unregistered documents. This court has also considered the provisions contained in Section 59 of the Transfer of Property Act and Section 17(1)(b) of the Registration Act, 1908, wherein it has been observed that decree for redemption cannot be passed on the strength of an unregistered document where the value of the property mortgaged is more than Rs. 100/-.

(22) Therefore, only alternative open to a party to such an unregistered document is to fall back upon his/ her title for getting possession of the property in dispute.

(23) Considering these two aspects, it is clear that in the present case also document was already entered into between the parties, which was an unregistered possessory mortgage. It is produced at Ex. 52. The sale deed was produced at Ex. 34.

(24) Considering these documents, it is clear that it is not enforceable in the Court of law for want of registration and for want of appropriate stamp duty. Therefore, when the said document is not enforceable, the only alternative left to the respondent no. 4 was to fall back his/ her title. In other words, a suit based on title for possession, in this type of exigency, is maintainable.

(25) So far title is concerned, there is no dispute between the parties. The sale deed dated 31st May, 1971 produced at Ex.44, shows that she is the owner of the property and the property has been sold to her by deceased Vrajlal. Therefore, by way of and by virtue of sale deed ex. 44 dated 31st May, 1971, the respondent no. 4 has become the owner of the property in question. Consequently, when she falls back on her title, her title has to be held to have been established on the basis of the said document ex. 44. Therefore, when she has produced and proved her tile on the strength of sale deed ex. 44 dated 31st May, 1971, it is clear that she is entitled to fall back on the same in order to claim her title over possession in respect of the property in question on the strength of the said title.

(26) Therefore, it cannot be said that the suit as

preferred was not maintainable.

(27) It has also been contended that the suit as filed was barred by law of limitation. Now, it is also required to be considered that the possessory mortgage dated 7.6.1971 produced at Ex. 52 before the trial Court clearly permitted the appellant as well as respondent Nos. 1 to 3 to remain in possession of the property in question for a period of 5 years. The respondent no. 4 would therefore not be in a position to claim possession of the suit property from the appellant as well as respondent nos. 1 to 3 till completion of that period of 5 years. The cause of action for possession would naturally arise on completion of the period of 5 years. Therefore, upto 1976, the respondent no. 4 cannot be said to have had the cause of action for filing a suit for possession against the appellant as well as respondent nos. 1 to 3.

(28) After the said period expired, it is not much in dispute that the respondent no. 4 issued notice of eviction and served it upon the appellant as well as respondent Nos. 1 to 3. There also she claimed that she was ready and willing to part with the amount of Rs. 6000/- and the appellant as well as respondent nos. 1 to 3 were at liberty to collect the same. Therefore, it is amply clear that the respondent no. 4 had taken prompt action for obtaining possession of the property in question after the aforesaid period of five years expired.

(29) Then it is to be seen that so far as the period of limitation is concerned, it would begin to run thereafter and not there before.

(30) It is also to be considered that the period of limitation of three years will not apply here because there is no denial to the title of the respondent no. 4 by the appellant as well as by respondent Nos. 1 to 3 and when the appellant as well as respondent Nos. 1 to 3 were under permissive user of the said property, the suit would not be treated to be barred by law of limitation, simply because the suit has not been filed within three years from the date of possessory mortgage dated 7.6.1971.

(31) It is further contended that the appellant as well as respondent Nos. 1 to 3 had adduced evidence to show that they were the tenants in respect of the property in question as per the decree. It is further contended that the trial court being a Civil Court and

not a Tribunal under Section 28 of the Bombay Rent Hotel and Lodging House (Rates) Control Act, 1947, it could not decide that the appellant as well as respondent nos. 1 to 3 were not tenants.

(32) It is true that the Rent Court established under Section 28 of the Act has jurisdiction to decide as to whether or not a particular person is a tenant, but when the suit has been filed in Civil Court, claiming possession on the strength of the title and when the defendants claim right of tenancy, the Civil Court has to incidently decide the issue as to whether or not the plaintiff is entitled to possession on the strength of the title. If the defendants have any objection, they should or could move the appropriate Rent Court for getting appropriate declaration. But in order to decide as to whether or not the plaintiff is entitled to possession on the strength of his/ her title to the property, despite the dispute raised by the defendants that they are tenants in respect of the said property, the Civil Court has to incidentally decide the issue.

(33) It is more so when the appellant as well as respondent nos. 1 to 3 have not approached the Rent Court or a rent Tribunal for getting declaration that they are the tenants in respect of the said property.

(34) It is further contended by Mr. R.N.Shah for the appellant that the possessory mortgage dated 7.6.1971 produced at Ex. 52 before the trial Court was really in the nature of a document of lease and was not really a possessory mortgage.

(35) The trial Court has not accepted this version. It is to be considered that so far the document is concerned, it has been very clearly stated in the document itself that the respondent no. 4 was not required to pay the interest on Rs. 6000/- taken by her and on the other hand, the other party had not to pay rent for staying in the said property. So it was rent free and interest free contract between the parties. In that view of the matter, it is not possible to accept the argument of Mr. R.N.Shah, learned advocate for the appellant that this document should be treated to be a document of lease and not a document of possessory mortgage.

(36) It is true that the appellant as well as respondent Nos. 1 to 3 had raised dispute that they were the tenants in respect of the property in question but as stated above, they have not obtained any decree from the

Rent Tribunal and on the other hand, the respondent no. 4 has shown a document ex. 52 dated 7.6.71 to the effect that it was a matter of possessory mortgage, which could not be permitted to be proved to be a mortgage deed before the court of law.

(37) Any way, though there was a dispute about tenancy right of the contesting defendants of the said suit, the trial Court had appreciated all the materials placed before it and found that the appellant as well as respondent nos. 1 to 3 had failed to prove that they were tenants in respect of the said property.

(38) As stated above, this decision has been taken by the Trial Court incidentally on the strength of the claim made in the written statement. The learned advocate for the appellant has relied upon certain decisions in support of his document. In case of SONI AMRATLAL GOVINDJI & ANR. VS. SONI PREMCHAND POPATLAL, reported in 1985(1) G.L.H. 266, it has been held that when there is a mortgage to the person who was already a tenant then on redemption of mortgage, the person shall be entitled to continue as tenant and entitled to statutory protection of the Rent Control Act.

(39) This decision would apply to a case only if the appellant as well as respondent Nos. 1 to 3 were tenants in respect of this property before the document dated 7.6.1971 came to be executed. There is nothing on record to show that they were tenants in this property prior to the said document. Even the appellant and respondent Nos. 1 to 3 did not plead at any point of time that they were tenants before 7.6.1971. Therefore, in view of the aforesaid factual aspect of the case, the said decision will not apply and appellant and respondent nos. 1 to 3 cannot legally claim tenancy right in this property on the strength of the said decision. Therefore, even this decision will not help the appellant.

(40) Learned advocate for the appellant has also relied upon a decision reported in 1985 GLR Page 132 in case of SONI AMRATLAL GOVINDJI & ANR. VS. SONI PREMCHAND POPATLAL. The said decision has been reported in the earlier decision. Only citations are different. Therefore, it is not necessary to discuss the same at length.

(41) The learned advocate for the appellant has also relied upon the case of SHAH MATHURADAS MAGANLAL & CO. VS. NAGAPPA SHANKARAPPA MALAGA AND OTHERS, reported in AIR 1976, SC 1565. The matter is quite different. The

premise was in possession of the tenant and the same were mortgaged. There the tenancy right was extinguished and on redemption, owner / mortgagor was held entitled to possession. Now, this was a matter in which there were two transactions of tenancy and mortgage. In the present case, we do not find such two transactions. The only transaction which is there on record is a transaction of mortgage and there is no transaction of tenancy. Therefore, even this decision will not apply to the facts of the case before us.

(42) Even the facts were different in case of PATEL ATMARAM NATHUDAS VS. PATEL BABUBHAI KESHAVLAL reported in 1975, GLH 509. There, there is a reference to Doctrine of merger under Section 60 of the Transfer of Property Act and observed as under :-

> " tenant acquiring right as a mortgagee, he cannot be said to have surrendered his tenancy rights. That during the period of mortgage tenancy would remain in abeyance and doctrine of merger would not be attracted. That, therefore, by creation of a mortgage in his favour does not forfeit his right to continue as a tenant."

(43) This will again be a matter when there are two transactions and two contracts, one relating to tenancy and another relating to mortgage. In the case before us, we do not have such type of two transactions and therefore, even this decision will not apply to the facts of their case.

(44) Any way, the suit is based on title and the title has been amply proved by the respondent no. 4 by producing the sale deed dated 31st May, 1971 at ex. 44. As said above, there was a document of possessory mortgage but it was not a registered one and therefore, the respondent no. 4 had no alternative but to fall back on her title as said by this Court as well as by the Supreme Court in AIR 1974 SC 689 (Supra) and in case of 1983 GLH UJ-41 (supra). In other words, the suit based on title, ignoring unregistered deed of possessory mortgage, is quite legally maintainable, for getting possession of the said property.

(45) It is true that respondent No. 4 did not and, legally, could not, claim any relief based on the deed of possessory mortgage dated 7.6.1971. It was therefore, not necessary for the trial Court to direct respondent No. 4 to deposit Rs. 6000/- the consideration of that mortgage, before the court as if he was passing

preliminary decree in a mortgage suit. However, this part of the decree is in favour of the appellant as well as in favour of the respondent Nos. 1 to 3 and it has already been complied with as per the statement made by the learned advocate for respondent no. 4 Mr. S.C. Shah and hence, it is not now necessary to disturb this part of the decree. But simply because this order has been relied by the learned Trial Judge, it cannot be said that the suit was barred on mortgage deed or it was for redemption of the mortgage dated 7.6.1971.

(46) In above view of the matter, it cannot be said that the trial Court has committed any error of law or has misinterpreted the facts, or that the Trial Court has not properly appreciated the facts before it. I am of the view that there is no error of law or fact committed by the Trial Court and the findings recorded by the Trial are not found to be illegal and erroneous. Therefore, in my view, there is no merit in the present appeal and therefore, the appeal is required to be dismissed.

(47) In the facts and circumstances of the present case, the appeal is ordered to be dismissed. The judgement and decree of the Trial Court are confirmed. However, looking to the facts and circumstances of the case, there shall be no order as to costs. At this stage, Mr. S.C.Shah, learned advocate for the respondent no. 4 has submitted that as per the decree of the Trial Court, the respondent no. 4 has already deposited the amount of Rs. 6000/- before the Trial Court on 21.8.1984. In that view of the matter, interim relief, if any, granted earlier, stands vacated. At the same time, the appellant as well as respondent nos. 1 to 3 are granted three months' time for vacating the property in question from today.

(D. P. Buch, J.)

pallav